UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JEN-SHU HSIEH, Appellant, v. DEFENSE NUCLEAR AGENCY, Agency.	DOCKET NUMBER DC04328910162 DATE: DEC 2 1991

William L. Bransford, Esquire, Neill, Mullenholz & Shaw, Washington, D.C., for the appellant.

David C. Rickard, Esquire, Alexandria, Virginia, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision issued on April 25, 1989, that sustained her removal for unacceptable performance in two critical elements of her position: Performance element 2, Special Projects; and Performance element 3, Exposure Room Beam Port. For the reasons set forth below, we DENY the appellant's petition, but REOPEN the case under 5 C.F.R. § 1201.117, and AFFIRM the initial decision AS MODIFIED herein.

BACKGROUND

The agency removed the appellant from her position of Research Physicist, GM-1310-13, effective December 31, 1988, for unsatisfactory performance of her position, which was covered by the Performance Management and Recognition System (PMRS). The agency charged that the appellant's performance was unsatisfactory in Performance element 2, Special Projects, and Performance element 3, Exposure Room Beam Port. Appeal File, tab 4, subtab 4, subtabs H and B.

The appellant filed a petition for appeal of the agency's action with the Board's Washington Regional Office and alleged that: (1) The agency failed to inform her adequately of the performance level that was required for retention in her position; (2) her performance standards were impermissibly vague; (3) she did perform at a satisfactory level; and (4) the agency's action was the result of reprisal for filing Equal Employment Opportunity (EEO) complaints, personal animus, and discrimination on the bases of her sex and national origin (Chinese).

After a hearing, the administrative judge sustained the agency's action and found that the appellant failed to establish her affirmative defenses. The administrative judge found that although the agency did not provide a written standard for performance below the fully successful level, the agency had communicated to the appellant the performance level necessary for her retention in her position because the fully successful level was that level of performance. Initial

Decision at 4-5. She further found that the agency afforded the appellant a meaningful opportunity to improve and that her performance in the two specified critical elements was unsatisfactory during her opportunity period.

Specifically, she found that following her performance evaluation of September 30, 1987, the agency had provided her with a letter of requirements explaining in detail the inadequacies in her performance and a 120 day period (extended to nearly five full months) to bring her performance to the fully successful level. When she failed to do so, the agency gave her a formal opportunity to demonstrate acceptable performance, a performance improvement period (PIP), which the agency found she also failed. As to element 2, the administrative judge found that the appellant had been working on this assignment before the letter of requirement and ever since, but that the report she submitted at the end of the PIP was superficial, criticized the assignment rather than actually doing it, and attempted to abdicate responsibility rather than doing the required analysis. Moreover, although she was given instructions numerous times, given multiple opportunities to ask questions, and was often asked for more detailed information on what she was doing, she did not provide the requested information or avail herself of the opportunities to clear up any possible misunderstandings of the assignment early in the process.

As to element 3, the administrative judge found that the appellant never made the required recommendation for a beam

port exposure room design or built and tested the required prototype. She did not follow the directions of her supervisor as to the difficult computer code with which she was working, but instead requested an outside contractor to help her, and never produced anything useable.

With respect to the appellant's affirmative defenses, the administrative judge found that she failed to establish a causal connection between the agency's action and the appellant's claims of prohibited personnel practices, including discrimination on the bases of her sex and national origin (Chinese), reprisal for prior equal employment opportunity (EEO) complaints, and personal animus. Finally, she found that the appellant failed to establish that the agency committed harmful procedural error.

The appellant has petitioned for review, alleging that the administrative judge erred in finding that the agency had adequately informed her of proper performance standards, that the standards were not impermissibly vague, and that she was given a meaningful opportunity to improve. The appellant contends that her performance standards were not valid because the agency did not define the minimally acceptable level of performance before or during her PIP and therefore required extrapolation of more than one level to determine unacceptable performance. The appellant also alleges that her performance was in fact satisfactory, the agency did commit harmful procedural error, and the agency did engage in prohibited personnel practices with regard to her removal.

The agency has responded in opposition to the petition for review, alleging, *inter alia*, that the administrative judge correctly decided the issues in this appeal. The agency argues that under 5 U.S.C. § 4302a(b)(6), the appellant, as a PMRS employee, must attain the fully successful performance level during her opportunity to improve if she is to be retained in her position. The agency therefore argues that it is not necessary to define a level of performance below that of fully successful. The agency also argues that it afforded the appellant a reasonable opportunity to improve and her performance remained unacceptable. In addition, the agency alleges that it had not committed harmful error or engaged in prohibited personnel practices.

ANALYSIS

The appellant's arguments constitute mere disagreement with the findings of the administrative judge on the factual issues of the case, and as such, provide no basis for Board review.

The appellant's petition for review challenges all of the fact findings of the administrative judge and sets forth her version of the events, her view of her performance, and her position as to the adequacy of her performance and as to the agency's actions and motivations. We find that these arguments present no basis for Board review because they constitute reargument of the same issues heard and decided by the administrative judge without a showing that her conclusions are unsupported by the record, were made without consideration of the material evidence of record, or are

implausible, outweighed by more persuasive evidence, or otherwise improper. Accordingly, we defer to the administrative judge's conclusions on these matters. *See, e.g., Jackson v. Veterans Administration*, 768 F.2d 1325, 1331 (Fed. Cir. 1985) (special deference must be given to the administrative judge's findings regarding credibility where those findings are based on the demeanor of witnesses); *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980) (mere disagreement with the administrative judge's findings and credibility determinations does not warrant full review of the record by the Board), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

Under 5 C.F.R. § 430.405, the agency must notify a PMRS employee who is given an unacceptable rating of the performance criteria for retention in her position; that level is the fully successful performance level.

We have reopened this appeal, however, because the issue of law involved in this case is one that the Board has not previously addressed. We note, in this regard, that when the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), was passed, the provisions for taking performance-based actions against employees who were supervisors and managers were no different from those applicable in actions against their subordinates. In 1984, the law was changed to draw this distinction, however, and 5 U.S.C. § 4302a was created. *See* Pub. L. No. 98-615, 98 Stat. 3214, Title II, § 202(a) (1984). The law was once again

amended in 1989. *See* Pub. L. No. 101-103, 103 Stat. 670 (1989). Because the action against the appellant was taken in 1988, we apply the provisions of the law and of the Office of Personnel Management's (OPM) implementing regulations as they read at that time.

As they existed in 1988, 5 U.S.C. § 4302a(b)(1) and (2) required that performance appraisal systems in the PMRS provide for five levels of summary performance ratings but as to each individual critical element of an employee's position, only required "establishing, in writing ... the performance standards for the fully successful level." Subsections (b)(3) and (4) then provided for the communication of the performance standards so established and for evaluating employees on the basis of "such standards." Finally, subsections (b)(5) and (6) required each performance appraisal system to provide for:

> (5) assisting any such employee in improving performance rated at a level below the fully successful level; and
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> (6) reassigning, reducing in grade, or removing any employee who continues to perform at the level which is 2 levels below the fully successful level, after such employee has been provided with written notice of such employee's rating and afforded reasonable opportunity to raise such employee's level of performance to the fully successful level or higher.

OPM's applicable regulation, 5 C.F.R. § 430.405, is consistent with the statutory scheme. Subsection (i) of that section requires that each appraisal system shall provide for assisting employees to improve their performance if it is rated below the fully successful level. Subsection (j)(2) then requires the communication of the performance level "that

must be reached in order to be retained" once an unacceptable rating has been communicated. Finally, subsection (j)(3) states:

> If, at the conclusion of the opportunity period referred to in paragraph (j)(1) of this section, the employee's performance is "Unacceptable," the agency must initiate reassignment, reduction in grade, or removal, subject to the provisions of 5 U.S.C. § 4303. When an employee's performance improves to level 2 but not level 3, the employee, if not reassigned, shall be required to undergo an additional opportunity period in order to demonstrate performance at the "Fully Successful" level or higher, as required by 5 U.S.C. § 4302a(b)(6).

We find that the law and regulations require that a PMRS employee perform at a fully successful level to retain her job. Accordingly, we necessarily find that the requirements for performance at the fully successful level are the ones which must be communicated to the employee when she begins her PIP. This is so because the legislative history of the 1984 act specifies that "the expected level of performance" under the PMRS is the fully successful level. *See* S. Rep. No. 351, 98th Cong., 2d Sess. 4 (1984), *reprinted in* 1984 U.S. Code Cong. and Admin. News 5563, 5565-66.[1] The appellant's contrary view would allow and thereby encourage employees to

[1] As noted, 5 U.S.C. § 4302a(b)(5) and (6) were amended in 1989. Consequently, the regulations were changed as well. It is now clear that a PMRS employee whose performance after a PIP is not at least at the fully successful level may be removed at that time. *See Kadlec v. Department of the Army*, MSPB Docket No. DC04329010288, slip op. at 8 n. 4 (July 29, 1991). While these changes have no effect on this case, we note the absence of legislative history in the 1989 law to indicate a Congressional intent to overrule its 1984 legislation. Rather, the changes made are consistent with a clarification of the earlier law.

aim at performance only good enough to secure a possible second opportunity to reach the mandated fully successful level, rather than aiming at fully successful performance itself.[2]

The objective of a PIP is to help an employee raise job performance to at least the fully successful level. This is accomplished by insuring that the employee is informed at the beginning of the PIP of the level of performance required for retention in that position. Accordingly, it would undermine this goal to describe for the employee at the beginning of a PIP the lower performance standards, which if attained could result at most in a possible second PIP. And it would equally undermine the performance improvement objective to equate the "retention" concept in section 430.405(j)(3) in the OPM regulations with a level of unsatisfactory performance that might suffice only to provide a second opportunity to improve performance to a fully successful level. The appellant's interpretation of the applicable statutory language and OPM regulations ascribes to Congress inconsistent objectives and therefore must be rejected as promoting an anomaly - job

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[2] The Board has previously held, with respect to non-PMRS employees, that the PIP provisions of Chapter 43 should not be interpreted to encourage performance that just suffices to avoid an immediate performance-based action. To do so would be to ignore "Congress' expressed desire that [Chapter 43] serve the public's interest in seeing that employees who do not live up to the public trust can be efficiently removed." *See Sullivan v. Department of the Navy*, 44 M.S.P.R. 646, 658, 659-60 (1990). We can think of no compelling reason to hold supervisors and managers, whose performance sets the example for others, to a lesser standard.

retention by less than fully successful performance. Such an absurd result directly contravenes Congressional intent in enacting Chapter 43. *See, e.g.*, S. Rep. No. 95-969, 95th Cong., 2d Sess. 10 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 2732 (dominant intent of Chapter 43 was to "simplify and expedite procedures for dismissals of Federal employees whose performance is below the acceptable level...").

Nor do we find the specific communication of a minimally successful level to be required by 5 C.F.R. § 430.405(j)(3). The regulation concerns and describes only the optional consequences at the completion of the PIP and therefore cannot be read as a mandate to inform the employee of anything at or before the start of the PIP. Its reference back to subsection (j)(1) is similarly unavailing because both it and subsection (j)(2) refer only to the fully successful level, and to the "standards that must be reached in order to be retained." *See Papa v. U.S. Postal Service*, 31 M.S.P.R. 512, 516 (1986) (each part of a regulation must be construed, not in isolation, but in conjunction with other parts of the regulation as a whole). As discussed above, we have found that those standards are the ones at the fully successful level, which were clearly communicated to the appellant.

Based on this holding, we find that the agency's failure to communicate to the appellant specific standards at the minimally successful level of performance is irrelevant to the propriety of its action. Neither the law nor OPM's

regulations requires that the agency's performance appraisal system contain such a rating level or, if it does, that it be in writing. *See Donaldson v. Department of Labor*, 27 M.S.P.R. 293, 297 (1985); FPM Bulletin 432-109 at 13 (August 5, 1989). Moreover, as we have found above, the appellant has not shown error in the administrative judge's determination that her performance, under the PMRS, was unacceptable during her PIP.

In this regard, we note that the administrative judge, based on the record evidence, found that despite having been provided two generous periods of time in which to improve her performance, as well as specific, goal-directed information designed to assist her in doing so, and the opportunity to ask questions and follow up on the assistance offered, the appellant instead criticized her assignment, attempted to blame others for her situation, produced nothing of substantial value, and in fact, far from improving her performance, actually lowered it during the eight months preceding the end of her PIP.[3] Moreover, to the extent that

[3] We note, too, that the appellant's position was a technical, scientific job, in the area of nuclear radiation and biology. Jobs of such a technical nature are not susceptible to performance standards that are strictly objective, and their standards may require a degree of subjective judgment that would not be necessary or proper in a position of a less professional or technical nature. *See, e.g., Stubblefield v. Department of Commerce*, 28 M.S.P.R. 572, 576 (1985). Moreover, the potential hazards of a failure to perform acceptably in a job that involves nuclear reactors and facilities are clearly more serious than those created in most other occupations. *See, e.g.*, Agency File at Tab BB, the appellant's position description, which specifies that the work to be done involves removal and disposal of nuclear contaminated material and the return of the reactor facility area to unrestricted public use, and notes that it involves

the appellant seeks information as to the minimally successful level of performance, we find that she was provided with it in her September 1987 performance evaluation and in the letter of requirement, which both state that her performance was minimally successful. The latter goes into greater detail in explaining why her performance was deemed to be at that level and what was needed to raise it to the fully successful level. Thus, the appellant was made aware by the agency of what it considered to be minimally successful performance.

We conclude, therefore, that the agency properly effected her removal.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

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the incumbent's exposure to ionizing radiation, special safety precautions, wearing a personal radiation exposure device, and adherence to federal and local safety regulations.

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must

submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.